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In the Supreme Court of the United States

OCTOBER TERM, 1974

LEONOR ALBERTI DE CANAS AND MIGUEL CANAS, PETITIONERS

v.

ANTHONY G. BICA AND JUAN SILVA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DIVISION

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum as *amicus curiae* is submitted in response to the invitation of the Court dated April 14, 1975.

STATEMENT

Petitioners, who are farmworkers, instituted this suit pursuant to California Labor Code §2805,[1] alleging that respondents had refused them continued employment due to a surplus of labor resulting from respondents' knowing employment of aliens not legally admitted to

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[1]California Labor Code §2805 (West, Cum. Supp. 1975) provides (Pet. App. C, p. 1c):

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers. (b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense. (c) The foregoing provision shall not be a bar to civil action against the employer based upon violation of subdivision (a).

the United States for permanent residence (Pet. 4).[2] Petitioners sought reinstatement and a permanent injunction against respondents' willful employment of illegal aliens.

The trial court, on February 14, 1973, declared California Labor Code §2805 unconstitutional on the ground that it had been preempted by federal immigration law, and dismissed the complaint (Pet. 4).[3] The California Court of Appeal, Second Appellate Division, affirmed (Pet. App. A), and the Supreme Court of California denied petitioners' request for a hearing (Pet. App. B).

ARGUMENT

The decision below is correct and review by this Court is not warranted.

The California law regulates the employment of all aliens in the state: it prohibits the employment of aliens illegally in the state (Cal. Labor Code §2805, *supra*, n. 1) and it requires other aliens to produce proof of lawful residence as a condition of employment (Cal. Administrative Code, Title 8, part 1, c. 8, Art. 1, §16209.4; Pet App. C, pp. 2c-3c). As such, it touches on "[o]ne of the most important and delicate of all international relationships," the recognized obligation of governments to protect "the just rights of a country's own nationals when those nationals are in another country." *Hines* v. *Davidowitz*, 312 U.S. 52, 64. "Consequently," as the Court said in *Hines* (*id.* at 66), "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where

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[2]Petitioners based their complaint upon California Civil Code §3369 (West, Cum. Supp. 1975), which in part authorizes injunctive relief to enforce a criminal statute prohibiting unfair competition (Pet. App. A, p. 2a).

[3]The statute was also declared unconstitutional in *Dolores Canning Co., Inc., et al.* v. *Robert E. Howard, et al.*, 115 Cal. Rptr. 435, 40 Cal. App. 3d 673 (Pet. App. A, p. 6a).

it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it' " (citing *Gibbons* v. *Ogden*, 9 Wheat. 1, 211).

The test to be applied in determining whether a state's law regulating aliens can survive in the face of federal legislation on the same subject was stated in *Hines, supra*, 312 U.S. at 67, 68 (footnote omitted), as follows:

> * * *[W]hether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits * * *.

The approach of *Hines* was described in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, as follows:

> * * *[T]he Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

There is, accordingly, very little room, if any, for state regulation of aliens. In our view the California law, as here applied, is invalid because it intrudes upon a field where Congress has comprehensively defined the consequence of hiring illegal aliens as farmworkers.

The comprehensive federal policy is enunciated in the Farm Labor Contractor Registration Act of 1963, 78 Stat. 920, 7 U.S.C. 2041, *et seq.*, as amended by the Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. 93-518, 88 Stat. 1652, *et seq.*, which defines the consequences of hiring illegal aliens.[4] In enacting the 1974 amendments, Congress indicated its awareness of the growing problem of employment of illegal aliens (S. Rep. No. 93-1295, 93d Cong., 2d Sess. 4 (1974)):

> * * *[I]llegal aliens have become an increasingly large source of farm labor in this country, and * * * the services of a contractor are often utilized to procure this clandestine workforce. Although the existing Act generally prohibits such activities by making it grounds for revoking or suspending the contractor's registration, such sanction in itself is ineffective since the majority of contractors have in the past ignored the Act's registration requirement. Thus, if this tide of illegal immigration is to be stemmed, stricter enforcement and stronger penalties must be applied against those who violate the Act. These additional steps are necessary in light of the adverse effect such importation of illegal aliens has had on the wages and job security of native Americans and lawfully admitted aliens, especially in times of high unemployment.

Accordingly, in those Amendments Congress (1) required farm labor contractors to "refrain from recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted

[4]While that Act contemplates some limited room for state law, the state law must be "appropriate." 7 U.S.C. 2051. As we show below, California Labor Code §2805 is not wholly in accord with federal policy, and thus is not appropriate.

for permanent residence or who had not been authorized by the Attorney General to accept employment," Sec. 11(a), 88 Stat. 1655; (2) extended the Farm Labor Contractor Registration Act to encompass (with certain limitations) contractors engaged in intrastate recruitment of farm workers, Sec. 2, 88 Stat. 1652-1653; (3) imposed additional farmworker-protection obligations on farm labor contractors, Sec. 10, 88 Stat. 1655; and (4) buttressed the enforcement mechanism of the 1963 Act by providing for civil money penalties, criminal penalties and private damage actions, Sec. 13, 88 Stat. 1656-1657. Indeed, petitioners concede (Pet. 13) that they could now assert the same cause of action and seek the same relief under the Farm Labor Contractor Registration Act Amendments of 1974 as they had asserted under the California law. Thus, federal law occupies the same field as the state law.

Section 2805 of the California Labor Code also conflicts with federal law, because the state law extends its criminal provisions generally to employers who knowingly employ an alien who is not entitled to lawful residence. Congress deliberately refrained from imposing criminal consequences upon the employment of illegal aliens in 8 U.S.C. 1324(a), which specifically provides that employment of an illegal alien shall not be deemed to constitute the crime of harboring an alien.

Moreover, Congress' recent consideration of legislation making it a crime to employ illegal aliens shows that the issue is a national one requiring a sensitive balancing of interests. When the proposal was first considered some Congressmen expressed the fear that the imposition of criminal penalties upon employers for the employment of illegal aliens would lead to a refusal by employers to hire any aliens in order to avoid any possibility of running afoul of the law. *E.g.*, 118 Cong. Rec. 30183

(1972) (remarks of Congressman Roybal). The House nevertheless passed the legislation. In the Senate, the bill was referred to the Judiciary Committee (118 Cong. Rec. 30445 (1972)), but no further action was taken.

To meet the fears that employers might refuse to hire all aliens, the bill was modified principally by providing for a graded series of penalties, beginning with a warning. See 119 Cong. Rec. 14181-14182, 14194 (1973). The House passed the legislation a second time. 119 Cong. Rec. 14208-14209 (1973). Again, in the Senate, the bill was referred to Committee (119 Cong. Rec. 14422 (1973)), but no further action was taken. The bill has been reintroduced in the present Congress as H.R. 982 (94th Cong., 1st Sess.).

The California law implicates problems of preeminent national concern. Congress has adopted the registration of farm labor contractors as the appropriate mechanism for control of the problem of employment of illegal aliens. It has specifically concluded that employment of illegal aliens does not constitute the crime of harboring. In considering legislation making the employment of aliens a crime, it has indicated that the problem is a national one which requires a more delicate balancing of interests than that achieved by the California law.

The California Court of Appeal correctly held that California Labor Code §2805 is invalid as applied in this case because the subject matter has been preempted by federal legislation. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.